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No. 01-1601

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden of the State Prison
at San Quentin,

Petitioner,

vs.

BRUCE WAYNE MORRIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO PETITION FOR WRIT OF CERTIORARI

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17 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION AND PROCEDURAL BACKGROUND 2

I BECAUSE RESPONDENT HAS ADVISED HIS ATTORNEYS THAT HE WISHES TO SEEK FEDERAL REVIEW OF HIS CONVICTION AND SENTENCE OF DEATH, ANY REVIEW OF THE PROCEEDINGS RELATED TO HIS PREVIOUS ATTEMPT TO ABANDON LITIGATION IS BOTH UNNECESSARY AND MOOT 5

II THE JURY IN RESPONDENT'S CASE SPECIFICALLY INQUIRED ABOUT A PENALTY INSTRUCTION THAT WAS LEGALLY AND FACTUALLY INCORRECT - A SITUATION COMPLETELY DISTINGUISHABLE FROM *JONES V. UNITED STATES*

APPENDICES

PROOF OF SERVICE

TABLE OF AUTHORITIES

Calderon v. Thompson, 523 U.S. 538 (1998)	7
In re Sanford Fork & Tool, 160 U.S. 247 (1895)	7
Jones v. United States, 527 U.S. 373 (1999)	2,3,8,9
Lonchar v. Thomas, 517 U.S. 324 (1996)	5,6
Morris v. Woodford, 229 F.3d 775 (9th Cir. 2000)	3
People v. Morris, 53 Cal.3d 152 (1991)	3
Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939)	7

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INTRODUCTION AND PROCEDURAL BACKGROUND

Petitioner - San Quentin death row Warden Jeanne Woodford - seeks to invoke this Court's certiorari jurisdiction on two bases. One question concerns Respondent Bruce Morris's previous request to abandon federal court review of his first capital habeas corpus petition. This issue is moot however, because Respondent Morris has advised his attorneys that he now desires to complete review of his state court conviction and sentence of death.[1]

The second question Petitioner has presented to this Court concerns whether the decision of the U.S. Court of Appeals below conflicts with this Court's holding in *Jones v. United States,* 527 U.S. 373 (1999). As we will demonstrate below, the Ninth Circuit's

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[1] See Appendix A: Declaration of Marianne D. Bachers.

decision is not in conflict with *Jones* because Respondent's case differs legally and factually from the situation presented to this Court in *Jones*. Thus, Respondent's second question also provides no basis for an exercise of this Court's jurisdiction., and certiorari should be denied.

Respondent Morris was convicted of the robbery/murder of Ricky Van Zandt in San Joaquin County, California in 1985. The California Supreme Court upheld Morris's convictions and death sentence.[2] A first federal petition was filed on June 15, 1993. There has never been a final disposition of every issue in that first petition.

When this case first reached the Ninth Circuit, the court had before it guilt phase issues related to accomplices' plea bargains and related jury instructions; a penalty phase instructional error; and, a claim that the district court had wrongly denied Respondent an evidentiary hearing into trial counsels' ineffectiveness and whether Respondent was incompetent to aid and assist his trial attorneys. The panel, in an opinion[3] written by Judge Graber, held that Respondent was entitled to an evidentiary hearing on the attorney ineffectiveness and incompetence claims. The court issued a limited remand order, and retained jurisdiction over the substantive issues, which it left undecided.

On a number of occasions while his case has been pending in federal court, Respondent has asked to abandon review of his federal capital habeas case, and then has

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[2] *People v. Morris*, 53 Cal.3d 152 (1991).

[3] *Morris v. Woodford*, 229 F.3d 775 (9th Cir. 2000).

withdrawn those requests.[4] After the Ninth Circuit remanded the case for evidentiary hearing, Respondent again sought to abandon review of his conviction and sentence. The district court then issued an order to show cause why Respondent's habeas case should not be dismissed and counsel relieved of their appointment, and set the matter on for hearing on October 19, 2001.[5]

At the same time Respondent was asking to abandon his habeas case, he was also asserting to the courts, appointed counsel and counsel for Petitioner that he was actually innocent of the homicide for which he was convicted and sentenced to death.[6]

Because it appeared the district court was about to dismiss Respondent's loyal (and so far, successful) appointed counsel, and was about to dismiss a capital habeas case over which the Ninth Circuit had retained jurisdiction, Respondent's attorneys filed a Petition for Writ of Mandamus, Request for Stay of District Court Proceedings and Motion to Recall the Mandate with the appellate court.

The Ninth Circuit stayed the district court proceedings and ordered briefing on

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[4] See Petitioner's Appendix D: District court order to show cause why case should not be dismissed. The district court's order mentions several occasions throughout the pendency of the case when Respondent has changed his mind about litigating his capital habeas case.

[5] See Petitioner's Appendix D.

[6] See Petitioner's Appendix F: Letter from Bruce Morris, sent to counsel for Warden Woodford, which states in part, "I feel I have been through enough for a crime I did not do...". See also Respondent's Appendix B: Declaration of Marianne D. Bachers and Tony Tamburello, filed with the Ninth Circuit, which states that Respondent continued to assert to them that he was actually innocent, and seemed to be suffering from severe depression due to changes in his custodial and visiting privileges on death row.

these issues. Ultimately, the Ninth Circuit recalled the mandate, denied relief on the guilt phase issues and granted penalty phase relief on an egregious instructional error.

I

BECAUSE RESPONDENT HAS ADVISED HIS ATTORNEYS THAT HE WISHES TO SEEK FEDERAL REVIEW OF HIS CONVICTION AND SENTENCE OF DEATH, ANY REVIEW OF PROCEEDINGS RELATED TO HIS PREVIOUS ATTEMPT TO ABANDON LITIGATION IS BOTH UNNECESSARY AND MOOT.

Appendix A to this Brief is a declaration under penalty of perjury signed by Respondent's Counsel of Record. That declaration states that Respondent has informed Counsel of Record Bachers, as well as CJA appointed counsel Tamburello, that he wishes to proceed with federal review of his capital conviction and death sentence. Respondent is aware that his death sentence has been set aside by the Ninth Circuit, and is relieved by that decision. He is looking forward to the evidentiary hearing in district court. Counsel of Record believed that Respondent would change his mind, as he has in the past. Indeed, he has.

Respondent's situation is similar to that in *Lonchar v. Thomas,* 517 U.S. 324 (1996). In *Lonchar*, the habeas petitioner also expressed conflicting desires about abandoning review of his state conviction and death sentence on a number of occasions. This Court ultimately held that where a first federal petition is at issue, the interest in

permitting federal review is quite strong.[7] This Court held that Lonchar's repeated indecision about abandoning review of his capital case was irrelevant where a first petition was concerned, and held that it could not be dismissed under "equitable" doctrines.[8]

Likewise here, where Respondent has made plain to his recognized legal representatives that he wishes to proceed with litigation of his capital habeas case, no further inquiry should legally be made into that decision, given the first petition posture of this case.[9]

In any event, the Ninth Circuit was on solid legal footing when it recalled the mandate and granted the petition for writ of mandamus. Jurisdiction of the case was still in the hands of the appellate court. The district court's authority was limited to holding an evidentiary hearing.

As this Court held:

The mandate of a higher court is "controlling as to the matters within its

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[7] *Lonchar*, 517 U.S. at 330.

[8] *Lonchar*, 517 U.S. at 331-32.

[9] Additionally, and importantly, Petitioner has waived review of this issue. When Petitioner filed the Petition for Rehearing in the Ninth Circuit after that court decided to defer ruling on the substantive legal issues and remand for evidentiary hearing, Petitioner specifically asked the appellate court to decide the substantive issues before remand. Thus, Petitioner cannot now complain that the appellate court did exactly as Petitioner requested in its earlier Petition for Rehearing.

compass."[10]

> When a case has once been decided by this court on appeal, and remanded to the circuit court, *whatever was before this court, and disposed of by its decree,* is considered finally settled. The circuit court is bound by its decree as the law of the case, and must carry it into execution according to mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, *upon any matter decided on appeal*; or intermeddle with it, further than to settle so much as has been remanded.[11]

The district court's order to show cause constituted intermeddling at its most extreme. The order suggested that the lower court was about to dismiss the case out from under the court which retained primary jurisdictional authority over the litigation.

Finally, the Ninth Circuit's action in recalling the mandate was completely within the bounds of *Calderon v. Thompson*.[12] Unlike that case, there was no final decision concerning the claims in Respondent's first federal petition. Additionally, it appeared the district court was about to allow Respondent to volunteer to be executed when the appellate court had intended to set aside Respondent's death sentence – a case over which the appellate court had controlling jurisdiction.

Consequently, the proceedings below concerning Respondent's abandonment of litigation request provide no legal or factual basis justifying the exercise of this Court's

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[10] *In re Sanford Fork & Tool,* 160 U.S. 247 (1895).

[11] *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 168.

[12] 523 U.S. 538 (1998).

certiorari jurisdiction.

II

THE JURY IN RESPONDENT'S CASE SPECIFICALLY INQUIRED ABOUT A PENALTY INSTRUCTION THAT WAS LEGALLY AND FACTUALLY INCORRECT – A SITUATION COMPLETELY DISTINGUISHABLE FROM *JONES V. UNITED STATES*

Petitioner has argued that the Ninth Circuit's grant of penalty phase relief based on instructional error is fundamentally at odds with *Jones v. United States*. This assertion amounts to a legal and factual misstatement.

Petitioner's jury received an instruction that inadvertently contained a typographical error – and therefore a completely incorrect statement of its sentencing options in the case. The instruction (special instruction 60) the jury received stated:

> If you have a reasonable doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty of life in prison *with* the possibility of parole.

The only sentencing options under California law at penalty phase are death or life without parole – thus, this instruction was both legally and factually incorrect.

After deliberating for a time, the jury sent out a note which stated:

> In the event this jury cannot decide 100% on the penalty phase of this case what would be the sentence imposed? Please explain noted page of instructions [special instruction 60].

The trial judge engaged in a short discussion with the jury, and ultimately told

them that he could not answer their question. Then the judge told the jury:

> The answer to the second question is that I feel as though the instruction itself is self-explanatory. And we would hope with that in mind, that you might be able to reach a decision.

After further deliberations, the jury sentenced Respondent to death.

Here, the jury plainly seized upon and asked about the fundamentally erroneous penalty phase instruction. To exacerbate the error, the trial judge told the jurors that the instruction was a correct statement of the law. It was not. Respondent's jury was completely misled about its sentencing options in direct response to an inquiry put to the trial judge.

The *Jones* case is completely different. The jurors in that case did not receive an erroneous instruction. They did not ask the trial court about the instruction which was in dispute. These legal and factual differences establish that *Jones* provides no basis upon which this Court's certiorari jurisdiction should be invoked.

For all of these reasons, the Petition for Certiorari should be denied.

DATED: June 23, 2002

Respectfully submitted,

MARIANNE D. BACHERS
Counsel of Record

TONY TAMBURELLO
Counsel Appointed Pursuant to CJA

ATTORNEYS FOR RESPONDENT

Appendix A

No. 01-1601

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DECLARATION OF MARIANNE D. BACHERS

I, Marianne D. Bachers, declare under penalty of perjury:

1. That I am Counsel of Record for Respondent Bruce Wayne Morris. I have represented Respondent since August, 1992, in federal habeas corpus proceedings related to his state conviction and sentence of death.

2. On a number of occasions, Mr. Morris has attempted to abandon litigation of his federal habeas claims. This has happened, in my opinion, because of episodic extreme depression my client experiences, and due to the changes in his conditions of incarceration. My client last attempted to abandon federal review in the summer of 2001. My co-counsel and I resisted this attempt, in part, because our client was also insisting he

was innocent of the crime for which he had been convicted and sentenced to death, at the same time that he was trying to abandon his habeas case. We believed that our client would, as he has every time in the past, change his mind and decide he did want to litigate the legal challenges to his conviction and death sentence.

3. In fact, our client has told both of us in person, by telephone and in writing, that he does want to seek review of his capital conviction and sentence. He is aware that his death sentence has been set aside by the Ninth Circuit and he is relieved that this has been done.

The foregoing is true and correct. This declaration was executed on June 23, 2002, at San Francisco, California.

Marianne D. Bachers

MARIANNE D. BACHERS

Appendix B

DECLARATION OF MARIANNE D. BACHERS AND TONY TAMBURELLO

We declare under penalty of perjury:

1. We are the attorneys appointed to represent Petitioner in federal capital habeas corpus proceedings. We make this declaration based on our own personal knowledge, and on information and belief.

2. We have been representing Petitioner for nearly ten years. Throughout the time we have represented him, he has occasionally sought to end review of his case. It is our experience that these requests occur when our client is experiencing mental distress. Our client has continuously and forcefully asserted to us that he is innocent of the murder of Ricky Van Zant, and it is that assertion, as well as our belief that the claims raised in his case are meritorious, which have guided our representation of Petitioner.

3. We have filed under seal privileged information which we believe supports the assertions made in paragraph 2, above. Due to the privileged nature of this information, we request that it not be disclosed to any person outside the Court.

The foregoing is true and correct to the best of our knowledge and belief. This declaration was executed on October 12, 2001 at San Francisco, California.

MARIANNE D. BACHERS

TONY TAMBURELLO

EX. D

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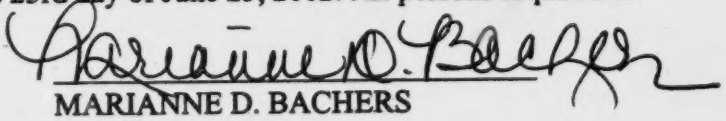
REPLY TO PETITION FOR WRIT OF CERTIORARI

I hereby certify that three copies each of the foregoing Reply to Petition for Writ of Certiorari have been forwarded to Counsel for Petitioner, WARD CAMPBELL, Deputy Attorney General, 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, via regular US Mail this 23rd day of June 23, 2002. All persons required to be served have been so served.



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